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No. 95-125

In The

Supreme Court of the United States

October Term, 1995

GENERAL MOTORS CORPORATION,

Petitioner,

v.

CITY OF KANSAS CITY, MISSOURI,

Respondent.

On Petition For A Writ Of Certiorari To The Missouri Court Of Appeals, Western District

PETITIONER'S REPLY MEMORANDUM

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The brief in opposition filed by the City of Kansas City, Missouri advocates form over substance and fiscal expediency over fundamental fairness. It thus illustrates why this Court must grant certiorari if the federal constitutional rights of General Motors Corporation and other taxpayers are to be preserved as the supreme law of the land.

1. The City's jurisdictional argument ignores this Court's precedents and distorts the history of this case.

GM has already demonstrated that it properly preserved its federal constitutional claim in accordance with prior decisions of this Court involving comparable facts

(Pet. 8-10), and the City makes no attempt to distinguish those cases. Nevertheless, the City argues GM did not timely present its due process claim to the Missouri courts because GM first raised it after the Missouri Supreme Court decided as a matter of first impression that a Missouri tax protest statute, Mo. Rev. Stat. § 139.031, applies to municipal taxes. *Armco Steel v. City of Kansas City,* 883 S.W.2d 3 (Mo. banc 1994). According to the City, GM should have foreseen the *Armco* decision years in advance and raised a due process claim beginning in the trial court. To the contrary, there is no requirement that a party present hypothetical and speculative constitutional claims. The facts show that GM acted promptly to protect its federal constitutional rights as soon as they were placed in jeopardy by the unprecedented actions of Missouri courts.

GM's due process rights were not deprived by the trial court or by the court of appeals prior to the *Armco* decision. Both of those courts determined that section 139.031 did not apply to municipal taxes and that a common law remedy was available. These decisions were consistent with the statutory framework and available precedents. Pet. 5-6, 13-14.

The earliest indication of any due process issue came only after GM had prevailed on its Commerce Clause argument before the court of appeals. On August 15, 1994, the Missouri Supreme Court issued its decision in *Armco* and simultaneously retransferred this case to the Missouri Court of Appeals for reconsideration. The City departs from the record when it asserts that "the Missouri Supreme Court issued its mandate to the Court of Appeals that the case be decided in accord with *Armco.*"

Brief Opp. 5. In reality, the supreme court merely remanded for reconsideration without dictating any particular outcome in this case. Pet. App. 11a. For example, the *Armco* decision did not declare section 139.031 to be an exclusive remedy or otherwise address the continued availability of a common law refund action.

GM immediately raised its due process claim by filing a motion on September 8, 1994 with the court of appeals, where the case was then pending. Pet. App. 76a-83a. GM argued that retroactive application of *Armco* would violate GM's due process right to a clear and certain remedy and would be contrary to this Court's decision in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990). Pet. App. 78a-82a. GM moved to brief and argue this issue, but the court of appeals rejected GM's request. Pet. App. 42a-43a. After the court of appeals issued its second opinion, GM reasserted its due process argument by motion for rehearing to the court of appeals and by application to transfer to the supreme court. Pet. App. 48a-75a. Both courts refused to consider the issue or this Court's newly-issued decision in *Reich v. Collins*, 115 S. Ct. 547 (1994). Pet. App. 40a-41a.

Thus, GM has promptly and repeatedly asserted its federal constitutional claim,but the Missouri courts have chosen to disregard the due process issue and this Court's pronouncements. At a minimum, this Court should grant certiorari in order to vacate and remand this case to the Missouri Court of Appeals with directions to address GM's constitutional argument and cases such as *Reich* and *McKesson*. The Court has taken similar action in several recent taxation cases where state courts have been

reluctant to address taxpayer arguments that threaten governmental fiscal interests. *See, e.g., Reich,* 115 S. Ct. at 549-50; *Harper v. Virginia Dep't of Taxation,* 113 S. Ct. 2510, 2514-16 (1993).

2. The City's effort to distinguish and limit *Reich* demonstrates continuing disregard of the supreme federal law and confirms the need for action by this Court.

The City first attempts to limit *Reich* by arguing there is no currently existing determination that the City's occupation license tax violates the Commerce Clause. This argument exalts form over substance because the Commerce Clause issues were litigated and decided in GM's favor before the *Armco* decision. In essence, the City argues GM has no remedy for a denial of due process so long as a state employs bait-and-switch tactics that prevent a decision favorable to the taxpayer from becoming final or that otherwise permit a state court to avoid reaching the merits of a taxpayer's claim. Properly construed, *Reich* condemns bait-and-switch tactics of all kinds without regard to the particular timing or technique employed.

Second, the City argues that *Reich* only applies where a taxpayer is "denied a remedy that was previously clear and certain, well settled law." Brief Opp. 7. Although it might appear from this premise that the City is prepared to argue that a state is free to maintain a misleading or confusing remedial scheme (such as existed here), the City instead repeatedly asserts that section 139.031 has always been a clear and certain remedy applicable to municipal taxes. This argument ignores the contrary interpretation of section 139.031 issued by courts in this very case as well as the City's contradictory positions in

Armco and this case. After arguing in *Armco* that section 139.031 did not apply to municipalities and that taxpayers had no right to pay under protest, the City now argues that GM should have done precisely that. Equally contradictory is the City's suggestion that a taxpayer's remedy can be well settled prior to being declared as a matter of first impression. Finally, even assuming section 139.031 could somehow be regarded as a clear and certain remedy, it was never regarded as exclusive and the City offers no justification for the denial of GM's pre-existing common law remedy.

CONCLUSION

For the foregoing reasons and for those stated in the petition, the petition for a writ of certiorari should be granted. Because the record plainly demonstrates Missouri courts have refused to abide by the supreme federal law, the case may be appropriate for summary disposition, either reversing the judgment outright or vacating and remanding with directions to consider GM's due process claim in light of this Court's controlling precedents.

Respectfully submitted,

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